Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

PRESENT TERM, 1980

NO. 79-1604

ALLEN HALL,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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This petition asks this Honorable Court to review the judgment of the Supreme Court of Alabama, denying certiorari, without opinion, at 377 So.2d 1128, styled *Ex Parte: Allen Hall, Petition for Writ of Certiorari to the Court of Criminal Appeals (Re: Allen Hall, Appellant, vs. State of Alabama, Appellee)*, and the judgment and opinion of the Alabama Court of

Criminal Appeals in *Hall v. Alabama*, reported at 377 So.2d 1123. The Alabama Court of Criminal Appeals affirmed, with an opinion, the judgment of the Circuit Court of Montgomery, Alabama, on October 16, 1979, and the Supreme Court of Alabama denied certiorari, without an opinion, on December 21, 1979. In essence, the Alabama Court of Criminal Appeals held that the evidence adduced on the trial of the petitioner, Allen Hall, was sufficient to allow the trial jury to find beyond a reasonable doubt and to a moral certainty, and beyond the presumption of innocence, that the circumstantial evidence in the case was sufficient to establish the constitutionally required ultimate inference that the defendant sold cocaine to an informant.

It is the position of the petitioner that the evidence adduced by the State of Alabama against the Petitioner Hall in the trial below does not meet the required

constitutional standard. Otherwise stated, the issue is one of whether or not the jury could have inferred from the evidence, viewed in the perspective of the presumption of innocence and the burden of proof, and mindful of the strong language used by the federal courts in establishing the quantum of evidence necessary, the necessary ultimate fact of sale of cocaine to have found the defendant guilty below.

The petitioner, therefore, respectfully argues that his conviction below clearly violates the Due Process Clause of the Constitution which protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. This constitutional standard finds strong expression in *Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 66 (1974); *Harris v. United*

States, 404 U.S. 1232, 1234, 92 S.Ct. 10, 12, 30 L.Ed.2d 25 (1971); *In Re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Gregory v. City of Chicago,* 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969); *Johnson v. Florida,* 391 U.S. 596, 88 S.Ct. 1713, 20 L.Ed.2d 838 (1968); *Thompson v. City of Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960; *Speiser v. Randall,* 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958); *Holland v. United States,* 348 U.S. 121, 138, 75 S.Ct. 127, 136-137, 99 L.Ed. 150 (1954); *Leland v. Oregon,* 343 U.S. 790, 795, 72 S.Ct. 1002, 1005-1006, 96 L.Ed. 1302 (1952); *Brinegar v. United States,* 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); and *Davis v. United States,* 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895).

The petitioner, therefore, asserts to this Honorable Court that he was denied due process of law below by the Alabama

Court of Criminal Appeals and the Supreme Court of Alabama in their affirming a judgment of conviction and prison sentence based thereon, and in denying certiorari in a case where the evidence does not meet the minimal constitutional standard declared by this Honorable Court in the above cases.

OPINION BELOW

The Court of Criminal Appeals of Alabama rendered a decision on October 16, 1979, affirming the judgment of the Circuit Court of Montgomery County, Alabama. The petitioner then filed an application for rehearing asserting the insufficiency of the evidence, which application for rehearing was denied, without opinion, by the Court on November 20, 1979. Thereafter, the petitioner applied to the Supreme Court of Alabama by petition for writ of certiorari. The Supreme Court of

Alabama denied certiorari on December 21, 1979, without opinion.

Copies of the courts' opinions are appended to this petition.

GROUNDS OF JURISDICTION

As noted, the judgment and opinion of the Alabama Court of Criminal Appeals was delivered on October 16, 1979. The application for rehearing was denied on November 20, 1979. The Petition for Writ of Certiorari to the Supreme Court of Alabama was denied on December 21, 1979.

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 2101 and 28 U.S.C. § 1257(3).

No application for rehearing is permissible under Alabama practice on the denial of a petition for writ of certiorari to the Supreme Court of Alabama.

QUESTION PRESENTED

Where the record in a criminal prosecution fails to reveal sufficient evidence on which a jury could infer findings which exclude every reasonable hypothesis except the guilt of the accused, and establishes at most no more than a choice of reasonable probabilities, is the evidence sufficiently substantial to sustain a criminal conviction when measured against the Due Process Clause of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV. - ... DUE PROCESS ...

> § 1 ... no state ... shall ... deprive any person of life, liberty, or property, without due process of law ... .

STATEMENT OF THE CASE

On July 21, 1978, Agent Don Williams, an undercover agent of the A.B.C. Board, went to a home at 2206 Greenville Street

in the City of Montgomery. (R. 10). [1] He had with him a confidential informant, (R. 11), by the name of Charles Gates. (R. 25).

Agent Williams had earlier listened in on a telephone call from Informant Gates to someone, (R. 27), but Williams did not recognize the voice on the other end to be that of Allen Hall.

Prior to going to 2206 Greenville Street, Agent Williams conducted a "cursory" search of Informant Gates for the purpose of ascertaining that he had nothing on his person. (R. 12). Williams did not make Gates remove his socks nor his clothing, (R. 29), and he did not check to see what Gates might have hidden in a body cavity. (R. 30). Williams gave Gates some money. (R. 12).

Upon their arrival at 2206 Greenville

1/ References are to page numbers in the transcript of the record and of the evidence on file in the Supreme Court of Alabama.

Street, three vehicles were observed at the residence. (R. 20). Williams and Gates went to the door and were met by Allen Hall, who admitted them to the house. (R. 13). Once inside, Williams was introduced by Gates to Hall, (R. 13), who left Williams and Gates in the living room and excused himself to finish a phone conversation. (R. 14). After about five minutes, Hall came back into the living room and asked Gates to go with him to the rear portion of the house. (R. 14). While Gates and Hall were out of the living room, Williams heard Hall loudly complain about Gates bringing a stranger to Hall's house. (R. 14). Williams cannot say there was no one else there. (R. 24). Williams never left the living room and knows nothing about the other parts of the house. (R. 24). After a short while, Hall came back into the living room momentarily, leaving Gates in the rear portion of the house. (R. 14, 15).

Several minutes later, Gates and Hall came back into the living room. (R. 15). Gates was carrying a carton (State's Exhibit 1) which contained a rather large bag of yellow pills (State's Exhibit 3) which did not contain any controlled substance. (R. 39, 44). The carton also contained two much smaller plastic bags (State's Exhibits 4 and 5) which were later found to contain cocaine. (R. 45).

After Gates and Hall came back into the living room, Williams and Hall had a brief conversation about Williams selling marijuana to Hall. (R. 18).

Williams and Gates then left the house at 2206 Greenville Street, with Gates carrying the carton. (R. 18). When they had gotten in their vehicle, Gates turned over the carton to Williams, (R. 19), who conducted another "cursory" search of Gates and concluded that he had no "money or anything" on his person. (R. 19).

The Petitioner Hall was convicted by the jury and sentenced to eight years imprisonment. (R. 89). The appeal to the Alabama Court of Criminal Appeals and the Petition for Certiorari to the Supreme Court of Alabama followed as previously noted.

The matter of the constitutional insufficiency of the evidence was raised in the trial court by a motion to exclude the evidence, which is the Alabama practice equivalent to motion for judgment of acquittal, (R. 60), and by a request for the affirmative charge. (R. 86). The constitutional insufficiency of the evidence was the principal issue in the Alabama Court of Criminal Appeals and in the Supreme Court of Alabama when measured against the presumption of innocence and the burden of proof as well as the Alabama rule which requires in a circumstantial evidence case that the evidence not only

prove guilt beyond a reasonable doubt, but exclude every reasonable hypothesis of innocence.

During part of the time period while the petitioner and the informant were in the back of the house, the narcotics agent was in the front of the house listening to a stereo set. (R. 15). Even with the noise from the stereo, the narcotics agent testified that he heard no other than the petitioner and informer while they were in back of the house, (R. 15), that he heard no one else in the house, (R. 24, 31, 38), that he did not hear any doors open and close, that he heard no cars arrive or leave and that he heard no toilet flush. (R. 38).

At the threshold, it is highly material to note that the indictment in the instant case charged the petitioner only with the sale of cocaine. (R. 75). It does not, as is the case almost universally, charge in the alternative, viz.: sale, possession,

distribution, etc., of the prohibited substance. Therefore, the evidence in the case must be reviewed only with the ultimately inferred fact of a sale in mind.

The "facts" in this case would not be complete without a statement of facts which were *not* shown by the evidence. The following facts which might have borne on the question of Allen Hall's guilt were notably absent from the State's evidence:

(1) There was not any sufficient showing that prior arrangements were made for Gates and Williams to go to 2206 Greenville Street.

(2) Although the evidence showed three vehicles at the house, no effort was made to determine who else was in the house while Gates and Williams were there. There was no evidence that no one else was there, nor that a third party didn't come to the place while Gates and Williams were there. (R. 25). Williams was totally unfamiliar with the house (other than living room)

and with its other outer doors. (R. 24, 40).

(3) It could not be said that Gates did not secrete the cocaine in this case in or on some part of his body which was not searched by Williams.

(4) Although the serial numbers of the money were recorded, (R. 57), no effort was ever made to determine if Allen Hall had in his possession any of the money provided to Gates by Williams. (R. 57).

(5) No radio transmitter (as is often used) was attached to Gates so that any officer could hear conversation between him and the suspected seller of drugs.

(6) Agent Williams overheard no conversation about drugs between Gates and Hall.

(7) There was no evidence that Allen Hall ever saw the small packages which contained the white powder (State's Exhibits 4 and 5). Since they were tucked around and under the large bag of yellow capsules (State's Exhibit 3), which were not illegal,

they may have been hidden from Hall's view.

(8) The only conversation about any drugs whatsoever was one between Williams and Hall about Hall buying (not selling) some marijuana from Williams.

(9) Williams saw no money nor drugs change hands.

(10) For aught appearing, Gates (while in the other part of the house) could have hidden the money in a book or a coffee can, or flushed it down a toilet. (R. 31, 32).

(11) For aught appearing, Gates could have visited Hall's home on an earlier occasion, secreted the cocaine in a place known only to him, and then recovered it while Hall was back in the living room with Williams.

(12) No effort was made to demonstrate Hall's fingerprints on the cigarette carton (State's Exhibit 1) or the other exhibits.

The only witnesses at the trial other than Agent Don Williams were Allan Raymond Adair, (R. 42), Larry Williams, (R. 48),

and Thomas Hopen, (R. 53). The testimony of these witnesses went only to identification of the white powder and the chain of evidence, matters which are not in issue on this appeal.

Nowhere does it appear that the State of Alabama offered any evidence as to the sale by the petitioner of cocaine. Thus, in order to make out a prima facie case against the appellant, the State must rely upon the jury to draw the necessary inferences from the fact that the informer was searched before, (R. 12), and after, (R. 19), meeting with the petitioner, that the informer apparently had no cocaine in his possession at the time of the initial search, (R. 12), and that he apparently no longer had possession of the money he had been given at the time of the final search. (R. 19).

REASONS FOR GRANTING THE PETITION

The instant petition should be granted because the holding by the Alabama Court of Criminal Appeals and the denial of certiorari by the Supreme Court of Alabama in effect decide the federal question of due process of law in a way probably not in accord with the applicable decisions of this court cited in the introductory paragraph hereto, supra, at 3 and 4.

In *Byrth v. United States,* 327 F.2d 917 (8th Cir. 1964), the defendant appealed a conviction for the possession and sale of narcotics. An informer had been searched twice before making contact with the defendant, the second time in detail. He was then supplied with money and sent to meet the defendant. Two agents had kept the informer under constant observation, although at times only one agent could see him. The informer was observed to meet the defendant, exchange objects with him and to return to the agents without contacting anyone else.

He was then searched and found to have possession of a narcotic, but not the money. The informer had not testified. In affirming the conviction the court observed that for a conviction founded wholly upon circumstantial evidence to stand, it was necessary for the evidence to exclude all reasonable hypothesises except that of guilt. The court noted that the informer had been thoroughly searched before and after contacting the defendant, that he had been seen to exchange objects with the defendant, that he had come into contact with no one else during this time. The court then stated that the evidence

> excludes every reasonable hypothesis except the inference from the circumstantial evidence that the defendant possessed and sold those narcotics to the informer. For such an ultimate inference to be valid, it must be based upon proven facts as one inference cannot be founded upon another to sustain findings proven by circumstantial evidence . . . . Therefore, the direct evidence, concerning the throughness of the

> informer's preparatory search and his continued observation during his mission, the facts from which the inference of guilt is drawn, must have been legally sufficient to establish their proof. *Id.*, at 920.

In *United States v. Saunders*, 325 F.2d 840 (6th Cir. 1964), the defendants appealed their convictions for possession and sale of narcotics. The court reversed the conviction as to two counts against one of the defendants. An informer (who was murdered prior to trial) was searched and provided with money before he met the defendant. Agents kept the pair under observation except for three short periods totaling about seven minutes. During one of these periods the informer was apparently out of sight of the defendant as well. During another period, the informer entered his house for about one minute, apparently in order to answer a phone call from an agent. Upon his return to the agents, he was searched and found to have possession of a

narcotic, but not the money. The court held this was insufficient evidence upon which to sustain the conviction and stated;

> Evidence that at most establishes no more than a choice of reasonable probabilities cannot be said to be a criminal conviction upon appeal . . . . This does not in any way depart from the rule in *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, relating to circumstantial evidence and requiring that it meet only the standard of establishing guilt beyond a reasonable doubt. *Id.*, at 843.

In *Jensen v. United States*, 403 F.2d 1019 (9th Cir. 1968), one of two defendants appealed his conviction for selling heroin. On at least two occasions agents had observed the co-defendant make contact with Jensen prior to delivering heroin to the agents. On one occasion the co-defendant brought the heroin directly to the agents. On another he stopped at a restroom first. The co-defendant had not been searched prior to contacting Jensen. In reversing Jensen's conviction on all six counts the court

observed that there was no competent evidence to prove that Jensen had had possession or had sold the heroin, and then stated, "We do not believe reasonable minds could find that the evidence excludes every hypothesis but that of guilt." *Id.*, at 1020.

In *Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974), the operator of a "Head Shop" had been convicted of wilfully contributing to the delinquency of a minor. The conviction stemmed from an alleged sale of a button which read, "Copulation Not Masturbation," to a 14-year-old girl. Pursuant to Rule 40(1)(d)(2) of the Rules of the Supreme Court, the Court reviewed the record and reversed the conviction. The Court noted that the crucial element of the crime was that the defendant had personally sold the button to the child or had caused it to be sold to her. The Court found the record to

be void of evidence of this element and observed that such evidence was not supplied by the concession of defendant that he had control of the premises on the relevant date. "In these circumstances, the conviction must be reversed. 'It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate(s) due process,'" *Id.*, at 665.

The statement quoted by the Court is from *Harris v. United States*, 404 U.S. 1232, 1234, 92 S.Ct. 10, 12, 30 L.Ed.2d 25 (1971), where the Court had under consideration the denial of bail pending an appeal to the Ninth Circuit. In granting the defendant's application for bail (which the state court had denied) the Court noted that the defendant's pending appeal was based on a lack of evidence in the record to support the inference upon which his narcotics conviction was founded. The statement was made

in support of the appeal being substantial, and not frivolous (the reason given for the state court's denial of bail).

Further support for the Court's statement in *Vachon*, supra, is provided by *Gregory v. City of Chicago*, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969); *Johnson v. Florida*, 391 U.S. 596, 88 S.Ct. 1713, 20 L.Ed.2d 838 (1968); and *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960).

The leading case on constitutional due process appears to be the recent case of *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), where the Court held that the reasonable-doubt standard in adult criminal trials should be extended to juvenile proceedings. In so doing, the Court stated: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon

proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 365, 90 S.Ct., at 1073.

Recent support for the principle that constitutional due process requires proof beyond a reasonable doubt of a criminal charge may also be found in *Speiser v. Randall,* 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958); *Holland v. United States,* 348 U.S. 121, 138, 75 S.Ct. 127, 136-137, 99 L.Ed. 150 (1954); and *Leland v. Oregon,* 343 U.S. 790, 795, 72 S.Ct. 1002, 1005-1006, 96 L.Ed. 1302 (1952).

In *Brinegar v. United States,* 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949), the Court stated:

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These

> rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property. *Id.*, at 174, 69 S.Ct. at 1310.

In *Davis v. United States,* 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895), the Court stated:

> No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged. *Id.*, at 493, 16 S.Ct., at 360.

And finally, in *Speiser v. Randell,* 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958), the court stated:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Here one party has at stake an interest of transcending value - as a criminal defendant his liberty - this margin of error is reduced as to him by the process of placing on the other party the the burden of producing a sufficiency

> of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.
> *Id.*, at 525-526, 78 S.Ct. at 1342.

If this Honorable Court grants certiorari in the instant case, the petitioner is prepared and has briefed many cases from various jurisdictions in the United States which will demonstrate how the instant case varied from the "controlled buy" cases in which judgments of conviction were either affirmed or reversed. The examination of these many cases will demonstrate how the ordinary practice of a "controlled buy" differed from the instant case in those cases where judgments were affirmed. For example, in *People v. Morgan*, 321 P.2d 873 (S.Ct.Cal. 1958), a judgment of conviction was reversed because of the fact that the state did not prove that the informer had no opportunity to contact parties other

than the defendant below, thereby resulting " . . . in a fatal gap in the chain of proof tending to show that defendant made sales of heroin." *Id.*, at 875.

In all of the "controlled buy" cases where an informant has not testified, and where the conviction has been affirmed, there has appeared some strong fact, at the trial, demonstrating that (1) the officers observed that no one else came in contact with the informant as in *United States v. Conception Cueto*, 515 F.2d 160 (5th Cir. 1975), (2) the evidence showed the innocence of all others who were in contact with the informant, as in *People v. Scott*, 339 P.2d 162 (S.Ct.Cal. 1959), or the evidence showed the defendant in possession of marked money immediately after the encounter, as in *California v. Grays*, 71 Cal.Rptr. 32 (S.Ct.Cal. 1968).

In conclusion, the recollection of the Court is respectfully refreshed as to the

necessity of strict constitutional limitations in cases involving convictions based on testimony of informants. Every informant in a controlled buy situation has a personal motive for aiding and assisting the law enforcement community in establishing the guilt of the defendant. In the instant case, the Informant Gates was not prosecuted by his prior involvement in narcotics cases. Mr. Gates is walking the streets free today because he testified in the instant case. As elicited on cross examination at R. 25 and 26;

> Q He was being used, you were trading his freedom for his ability to make cases against people, weren't you?
>
> A He had agreed to assist the State in other drug cases, yes, sir.
>
> * * * *
>
> Q All right. But it is true, isn't it, based on your ten years experience in undercover work that when you deal with these people who have been caught in drug offenses and you make informants out of them that you are trading their favors like freedom in exchange for them going out and helping you arrest other people? Isn't that true?
>
> A Any time someone is arrested for the sale of drugs or drug-related cases they are given an opportunity to help themselves and the state, yes, sir.

The Petition for Writ of Certiorari to this Honorable Court is due to be granted on the ground that the evidence adduced at the trial below is constitutionally insufficient on which to base a judgment of conviction and eight-year term in the Alabama State Penitentiary.

Respectfully submitted,

Frank W. Riggs

Frank W. Riggs

IRA DE MENT

Ira DeMent

(Attorneys for Petitioner)

CERTIFICATE OF SERVICE

I, Ira DeMent, Attorney for Petitioner, hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Alabama on Honorable Charles A. Graddick, Attorney General of Alabama, by depositing a copy of same, first-class postage prepaid, in the United States Mail, properly addressed to him at 250 Administrative Building, Montgomery, Alabama 36103, on this the 19th day of March, 1980.

FRANK W. RIGGS
IRA DE MENT
(Attorneys for Petitioner)

By IRA DE MENT

APPENDIX

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1979-80

3 Div. 65

Allen Hall

v

State

Appeal from Montgomery Circuit Court

BOWEN, JUDGE

The defendant was indicted and convicted for the unlawful sale of cocaine contrary to the provisions of Alabama Code Section 20-2-70 (1975). Sentence was fixed

at eight years' imprisonment. Three issues are presented on appeal.

I

Present in the courtroom at the beginning of the defendant's trial was a group of eighth grade students who were "a part of an organized regular scheduled program whereby every eighth grader in the City and County of Montgomery comes through the courthouse". Defense counsel objected to their presence.

> "I would move to exclude that group of students from the courtroom on the grounds that their presence here is something that is arranged for and I think it has a prejudicial effect on my client's opportunity for a fair trial because I'm afraid that the jurors might be affected in their deliberations in this case and might be more inclined to find my client guilty in the presence of a group of eighth graders than they would if they were not subjected to that influence."

This motion was overruled. Defense counsel did not offer to prove that this

"undesirable influence" existed and, after his objection was overruled, did not further pursue the matter. There was no motion for a new trial. The objection is not to any particular conduct of the group or any one of them, but to their mere presence in the courtroom.

While the defendant is entitled to a trial free of any extraneous influence that might be to his prejudice, Hammond v. State, 26 Ala.App. 391, 160 So. 900 (1935), a criminal trial should be public. Jackson v. Mobley, 157 Ala. 408, 47 So. 590 (1908). If the conduct of a spectator interferes with the administration of justice, he may be removed. Williams v. State, 57 Ala.App. 158, 326 So.2d 686, cert. denied, 295 Ala. 428, 326 So.2d 692 (1975). Much is left to the discretion of the trial judge in this regard. McGuire v. State, 239 Ala. 315, 318, 194 So. 815 (1940). Although McGuire was a prosecution for the

murder of a street car conductor, the trial court refused to exclude from the courtroom some conductors or motormen who entered during the trial and who were in uniform. The appellate court upheld the judge's action:

> "During the entire trial the record gives no indication of any feeling of prejudice or the slightest disorder; and the mere fact that it was a conductor who was killed gave no just reason to exclude these men from the courtroom. This too was largely a matter of discretion, with no abuse thereof shown." 239 Ala. at 318.

As McGuire indicates, even persons related to the victim have been properly allowed to remain in the courtroom absent prejudicial conduct on their part. Howard v. State, 273 Ala. 544, 142 So.2d 685 (1962) (daughter and wife of victim in murder prosecution); Kendrick v. State, 55 Ala. App. 683, 318 So.2d 378 (1975)(father of victim in case of assault with intent to

ravish); Brodka v. State, 53 Ala.App. 125, 298 So.2d 55 (1974) (brother of deceased in murder prosecution); Pollard v. State, 12 Ala.App. 82, 68 So. 494, reversed on other grounds, Ex parte Pollard, 193 Ala. 32, 69 So. 425 (1915) (victim's wife and children in murder prosecution).

The comments of the court in Pollard, 12 Ala.App. at 89-90, are enlightening.

> "No objectionable conduct is shown or complained of otherwise than the mere presence of the parties. The question presented is purely one of the trial court's discretion, and nothing is disclosed by the record showing an abuse of that discretion. Courts exist for the administration of justice, and in the conduct of trials in general much must, of necessity, and in the very nature of things, be left to the discretion of the court charged with the duty of administering justice, and having the inherent power to regulate such matters in the trial forum. The court is charged with a high and important duty not without its difficulties in taking proper care to effect the object of according to the accused a fair and impartial trial while having due regard to interests of the

> state. No legal reason except that addressed to the court's discretion was assigned why the widow and children should have been excluded or removed to a different part of the courtroom, and we know of no rule of law that would authorize a court to exclude spectators or other persons from the courtroom, or remove them from the view of the jury, during the progress of a public trial of this nature, except for misconduct or some cause that appealed to the sound discretion of the court in administering substantial justice; and it is only an abuse of that discretion that this court can review . . . ."

The record does not support a finding of prejudice to the defendant from the presence of the students in the courtroom. This was a matter within the discretion of the trial judge, and, no abuse being shown, his judgment must be upheld.

II

The defendant alleges that there was a fatal gap in the sufficiency of the evidence to support his conviction because the alleged sale was made to an informant

who did not testify and was made out of the presence of any law enforcement officer. The defendant contends that, in the absence of direct proof that the informer received the cocaine from the defendant, the possibility arises that he might have received it from some unidentified person, or that the cocaine was his, cached in the residence for such an opportunity.

The cases cited by the defendant in support of his contention

> "are merely illustrations of the rule that where the evidence of guilt is purely circumstantial it is legally insufficient unless it is so complete as to exclude every reasonable hypothesis of innocence. Under this rule it is held that where the case of the People consists solely of evidence that an informer was given money with which to purchase a narcotic, was seen to contact the defendant and afterwards returned with a narcotic, the evidence is insufficient in the absence of evidence that the informer did not have the narcotic on his person when he left or the money when he returned and no evidence that the defendant delivered

anything to the informer."

****

"Even when there is no search of the informer and no direct evidence that the informer received anything from the defendant, identification of the defendant as the supplier of the narcotic may be established by other evidence which reasonably and logically tends to prove that fact."

People v. Ollado, 246 Cal.App.2d 608, 55 Cal.Rptr. 122, 123-124 (1966).

The fact that no witness saw the exchange of money and narcotics between the informer and the defendant is not fatal to the prosecution if the identification of the defendant as the supplier of the narcotics may be established by other evidence which reasonably and logically tends to prove that fact.

On the evening of July 21, 1978, Don Williams, an undercover agent for the Narcotics Enforcement Division of the Alabama Beverage Control Board, went to the Wetumpka residence of an informant,

Charles Gates. Agent Williams and Gates telephoned the defendant although the contents of that conversation, which Williams overheard, were not disclosed.

After this call, Williams and Gates went to an area near 2206 Greenville Street in Montgomery. There Agent Williams conducted a "cursory search" of informant Gates "to ascertain that he had nothing on his person other than what I provided for him or gave to him prior to going into the residence of Allen Hall", the defendant. Finding nothing on Gates, Williams gave him four hundred and ten dollars.

A pickup truck driven by the defendant was parked outside the residence on Greenville Street. There were no "strange automobiles" there and the "cars there were known to be those of" the defendant. The defendant answered the door and Gates introduced him to Agent Williams. Gates and Williams then waited in the living room while the defendant finished his

business on the telephone in another room of the house.

The defendant returned after approximately five minutes and asked Gates to go to the rear portion of the house with him. Agent Williams heard loud shouting to the effect that the defendant "was displeased or upset with the fact that the confidential informer had brought a stranger to the house". The defendant stated "don't you ever bring an S.O.B. to this house again without first telling me".

A "short time" passed and the defendant returned to the living room and placed a record on the stereo. The defendant then returned to the rear portion of the house.

Within two or three minutes the defendant and Gates returned to the living room. Gates was carrying a Merit cigarette carton and placed it on the coffee table.

The carton was open and contained some yellow capsules in a plastic bag and two small packages of white powder later determined to be cocaine.

Agent Williams and the defendant then had a brief conversation in which the defendant "was attempting to solicit large quantities of marijuana for" Williams. The defendant "stated that anything over ... anything up to fifteen pounds he could handle financially himself and anything over fifteen pounds that he could get backing for it. That he would be willing to sign a loan or a note to (Williams) if (Williams) would front large quantities of marijuana to him." Williams and the defendant also had a conversation about the yellow pills during which the defendant commented "something to the effect that a lot of people were getting off on them, that they were real good speed". These yellow pills were stimulants

but contained no prohibited or controlled substance under Alabama law.

Williams and Gates, who carried the narcotics, left the residence. Williams testified that the narcotics "stayed in my sight until the informant had sat down in the seat of the van". Williams drove a couple of blocks, pulled over, and again conducted a "cursory search" of Gates. "There was no money or anything on his person at that time."

Agent Williams testified that during the time he was in the house there was no indication that there was anyone else inside the house besides himself, Gates and the defendant; that he neither saw nor heard anyone. However, on cross examination, he testified that he "couldn't swear there was no one else there".

Agent Williams defined a "cursory search" as "a search of an individual's person, of his clothing, his shoes - to

ascertain that there is no other property within his clothing". Williams checked the informer's clothing but did not conduct a thorough search of his anatomy for hidden quantities of drugs.

Williams did not see any money pass between the informant and the defendant.

As in People v. Grays, 71 Cal.Rptr.32, 36 (Cal.App. 1968), the evidence in this case does not bring the defendant within the purview of those cases which have required proof that the purchaser of narcotics lacked the opportunity to contact anyone other than the defendant at the time of the alleged sale.

This Court discussed the sufficiency of circumstantial evidence to support a conviction in Cumbo v. State, 368 So.2d 871 (Ala.Cr.App. 1978), cert. denied, 368 So.2d 877 (Ala. 1979).

> "In reviewing a conviction based on circumstantial evidence, this

court must view that evidence in the light most favorable to the prosecution. The test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude."

* * * *

"Guilt is not established by circumstantial evidence unless the facts relied on are such that it is the only conclusion fairly to be drawn from them .... If all the material circumstances in evidence point to guilt and exclude any reasonable hypothesis except that of guilt a conviction is warranted ....

"However 'it is not every hypothesis, but every reasonable hypothesis but that of guilt, that the circumstantial evidence must exclude' ....

"(T)he true test of the sufficiency of circumstantial evidence to justify a conviction is whether the circumstances as proved produces a moral conviction to the exclusion of every reasonable doubt. It is not necessary for the circumstances to be 'such as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the accused'."
(citations omitted)
Cumbo, 368 So.2d at 874 and 875.

In reviewing the facts of this case we think that there was sufficient evidence from which the jury might have properly excluded every reasonable hypothesis except that of the defendant's guilt beyond a reasonable doubt.

The cases cited by the defendant are distinguishable upon their own particular circumstances. In People v. Lawrence, 336 P.2d 189 (Cal.App. 1959), the court found a "total gap" in the chain of evidence where the informer alone went into the defendant's residence and remained for approximately three hours during which time the defendant's wife and another individual entered the apartment. Upon leaving the defendant took a taxi and rode for two blocks, got out and only then did he deliver to the police a package of heroin allegedly purchased from the defendant. In People v. Blackshear, 67 Cal.Rptr. 662 (Cal.App. 1968), the court noted that the

officer did not search the informant before and after the transaction, did not see what was exchanged, and the informant was not in the officer's view when the officer went to the driver's side of the car, thus making it possible for the informant to pocket the ten dollars and produce the narcotic filled balloon himself. The court recognized the principles stated in Ollado, supra, that neither a search of the informer nor direct evidence that the informer received the narcotics from the defendant is essential to a conviction, but noted that there was no additional evidence which would reasonably and logically support the conviction of the defendant.

In People v. Rivera, 59 A.D.2d 874, 399 N.Y.S.2d 662 (1977), the informant was wearing a concealed microphone. The police picked up a number of voices indicating that there were several people in the building with the defendant. The court noted that

the police had no personal knowledge that the defendant was in the building and held that, in the absence of any proof that the informer received the narcotics from the defendant, the possibility arises that the informer might have received them from some unidentified person or that it was his cached in the building for such an opportune time as this. The court noted that an inordinate amount of inferences would have to be drawn from other inferences in order to sustain the defendant's conviction.

While the State's case was not the strongest case of circumstantial evidence, we think that it was sufficient to present a question for the jury. To accept the defendant's argument under the instant factual situation would require proof of his guilt beyond any conceivable doubt, whether reasonable or not, and place upon the prosecution the burden of proving

circumstances that are absolutely incompatible with his innocence. That is not the test of the sufficiency of circumstantial evidence.

III

The indictment charged only that the defendant did "sell" cocaine. The defendant's written requested charge was refused.

> "Even if you should be satisfied beyond a reasonable doubt, from the evidence that Allen Hall delivered cocaine to someone, you could not convict him in this case unless you find beyond a reasonable doubt that a sale for money or other valuable consideration took place."

On this matter, the trial judge instructed the jury.

> "Now as to the law on the sale of drugs .... Another element of proof, a second element is that it was the word sale has its ordinary and common meaning, simply, to transfer something by agreement from one person to another for some consideration. The third element, of course, is that you must be convinced

> beyond a reasonable doubt and to a moral certainty that this defendant sold cocaine."

Those instructions fairly and adequately covered the written instruction requested by the defendant.

On appeal, the defendant argues that the trial court's oral charge "has a tendency to confuse non-lawyer jurors by using the term 'consideration', the meaning of which would be uncertain and confusing to the jury". If this argument is valid, then the trial judge properly refused to give the defendant's requested charge because it also contains the term "consideration".

Our review of the record convinces us that the question of the defendant's guilt or innocence was properly submitted to the jury. The judgment of the circuit court is affirmed.

AFFIRMED.

ALL THE JUDGES CONCUR

APPENDIX

EX PARTE ALLEN HALL

(Re Allen Hall

v.

(State of Alabama)

79-187.

Supreme Court of Alabama

Dec. 21, 1979.

Certiorari to the Court of Criminal Appeals.

ALMON, Justice.

Writ denied.

TORBERT, C. J., and BLOODWORTH, FAULKNER and EMBRY, J.J., concur.